

**MCHELLE BETANCOURT**

California Bar No. 215035

**FEDERAL DEFENDERS OF SAN DIEGO, INC.**

225 Broadway, Suite 900

San Diego, California 92101-5008

Telephone: (619) 234-8467

e-mail: Michelle\_Betancourt@fd.org

Attorneys for Mr. Lazaro Lopez-Gonzales

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

**(HONORABLE ROGER T. BENITEZ)**

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAZARO LOPEZ-GONZALES,

Defendant.

) CASE NO. 07CR3393-BEN

) DATE: February 4, 2008

) TIME: 2:00 P.M.

) NOTICE OF MOTIONS AND MOTIONS TO:

) 1) COMPEL PRODUCTION OF DISCOVERY  
) AND PRESERVE EVIDENCE;

) 2) GRANT LEAVE TO FILE FURTHER  
) MOTIONS

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND  
STEVEN D. DeSALVO, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on Monday, February 4, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, Mr. Lopez-Gonzales, by and through his attorneys, Michelle Betancourt, and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the following motions.

**MOTIONS**

Mr. Lopez-Gonzales, by and through his attorneys, Michelle Betancourt, and Federal Defenders of San Diego, Inc., moves this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law, and local rules for an order:

(1) Compelling Production of Discovery and Preserving Evidence;

(2) Granting Leave to File Further Motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of these motions.

Respectfully submitted,

s/ Michelle Betancourt

Dated: January 22, 2008

**MICHELLE BETANCOURT**  
Federal Defenders of San Diego, Inc.  
Attorneys for Mr. Brown

**MICHELLE BETANCOURT**

California Bar No. 215035

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225 Broadway, Suite 900

San Diego, California 92101-5008

Telephone: (619) 234-8467

Attorneys for Mr. Lopez-Gonzales

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

**(HONORABLE BARRY TED MOSKOWITZ)**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Lopez-Gonzales,

Defendant.

) CASE NO. 07CR1617-BTM  
)  
)  
)  
) STATEMENT OF FACTS AND  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF MOTIONS  
)  
)  
)  
)

**I.**

**STATEMENT OF FACTS**

On June 20, 2007, the grand jury for the Southern District of California returned a three count indictment charging Mr. Brown, along with Timothy Thompson with one count armed bank robbery in violation of Title 18 U.S.C. 2113(a) and (d) and Title 18 U.S.C. § 2 and one count of brandishing a firearm in relation with a crime of violence in violation of Title 18 U.S.C. § 924(c)(1)(A)(ii).

These motions follow.

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**II.**

**THIS COURT SHOULD COMPEL DISCOVERY AND ORDER  
THE PRESERVATION OF THE EVIDENCE**

Mr. Brown moves for the production by the government of the following discovery and for the preservation of evidence. This request is not limited to those items about which the prosecutor knows, but includes all discovery listed below that is in the custody, control, care, or knowledge of any government agency. See generally Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989). To date, the defendant has received 54 pages of discovery.

1. The Defendant's Statements. The Government must disclose to the defendant all copies of any written or recorded statements made by the defendant; the substance of any statements (even if not written or recorded) made by the defendant which the Government intends to offer in evidence at trial; any response by the defendant to interrogation; the substance of any oral statements which the Government intends to introduce at trial and any written summaries of the defendant's oral statements contained in the handwritten notes of the Government agent; any response to any Miranda warnings which may have been given to the defendant; and any other statements by the defendant. FED. R. CRIM. P. 16(a)(1)(A). The Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the Government must reveal all the defendant's statements, whether oral or written, regardless of whether the government intends to make any use of those statements.

2. Arrest Reports, Notes and Dispatch Tapes. The defense also specifically requests that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his arrest or any questioning, if such reports have not already been produced in their entirety, be turned over to his. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of the defendant or any other discoverable material is contained. This is all discoverable under FED. R. CRIM. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). See also Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are available under FED. R. CRIM. P. 16(a)(1)(B) and (C), FED. R. CRIM. P. 26.2 and 12(i). Preservation of rough notes is requested, whether or not the government deems them discoverable.

1           3. Brady Material. The defendant requests all documents, statements, agents' reports, and  
2 tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the  
3 government's case. Impeachment and exculpatory evidence both fall within Brady's definition of evidence  
4 favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S.  
5 97 (1976).

6           4. Any Information That May Result in a Lower Sentence. As discussed above, any  
7 information which may result in a more favorable sentence must also be disclosed pursuant to Brady v.  
8 Maryland, 373 U.S. 83 (1963). The Government must disclose any cooperation or attempted cooperation  
9 by the defendant, as well as any information that could affect any base offense level or specific offense  
10 characteristic under Chapter Two of the Guidelines. Also included in this request is any information  
11 relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, or any other  
12 application of the Guidelines.

13           5. The Defendant's Prior Record. Evidence of a prior record is available under FED. R. CRIM.  
14 P. 16(a)(1)(B). Counsel specifically requests a complete copy of any criminal record.

15           6. Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under FED.  
16 R. CRIM. P. 16(a)(1)(C) and FED. R. EVID. 404(b) and 609. In addition, under FED. R. EVID. 404(b), "upon  
17 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the  
18 general nature . . . ." of any evidence the government proposes to introduce under FED. R. EVID. 404(b) at  
19 trial. Sufficient notice requires the government to "articulate precisely the evidential hypothesis by which  
20 a fact of consequence may be inferred from the other acts evidence." United States v. Mehrmanesh, 689 F.2d  
21 822, 830 (9th Cir. 1982) (emphasis added; internal citations omitted); see also United States v. Brooke, 4  
22 F.3d 1480, 1483 (9th Cir. 1993) (reaffirming Mehrmanesh and reversing convictions).

23           This includes any "TECS" records (records of prior border crossings) that the Government  
24 intends to introduce at trial, whether in its case-in-chief, impeachment, or rebuttal. Although there is nothing  
25 intrinsically improper about prior border crossings, they are nonetheless subject to 404(b), as they are "other  
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acts" evidence that the government must produce before trial. United States v. Vega, 188 F.3d 1150, 1154-55 (9th Cir. 1999).<sup>1</sup>

The defendant requests that such notice be given three weeks before trial to give the defense time to adequately investigate and prepare for trial.

7. Evidence Seized. Evidence seized as a result of any search, either warrantless or with a warrant, is discoverable under FED. R. CRIM. P. 16(a)(1)(C).

8. Request for Preservation of Evidence. The defense specifically requests that all dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved. This request includes, but is not limited to, the results of any fingerprint analysis, the vehicle involved in the case (including all parts of the vehicle and items within the vehicle), the defendant's personal effects, and any evidence seized from the defendant, any material witness, or any other third party. This request also includes any material or percipient witnesses who might be deported or otherwise likely to become unavailable (e.g., undocumented aliens and transients).

It is requested that the prosecutor be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist, to inform those parties to preserve any such evidence.

9. Henthorn Material. The defendant requests that the Assistant United States Attorney ("AUSA") assigned to this case oversee (not personally conduct) a review of all personnel files of each agent involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S. 437, 438 (1995) (holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to, any complaints filed (by a member of the public, by another agent, or any other person) against the agent, whether or not the investigating authority

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It bears repeating that under Ninth Circuit case law and the advisory notes to Rule 404(b) the government must turn over any "other acts" evidence it intends to use in its case-in-chief, for impeachment, or as possible rebuttal. See Vega, 188 F.3d 1154-55.

1 has taken any action, as well as any matter for which a disciplinary review was undertaken, whether or not  
2 any disciplinary action was ultimately recommended. The defendant further requests production of any such  
3 information at least one week prior to the motion hearing and two weeks prior to trial. If the prosecutor is  
4 uncertain whether certain information should be disclosed pursuant to this request, this information should  
5 be produced to the Court in advance of the motion hearing and the trial for an in camera inspection.

6 10. Tangible Objects. The defendant requests the opportunity to inspect, copy, and test, as  
7 necessary, all other documents and tangible objects, including photographs, books, papers, documents,  
8 fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended  
9 for use in the government's case-in-chief or were obtained from or belong to the defendant. FED. R. CRIM.  
10 P. 16(a)(1)(C). Specifically, the defendant requests copies of all photographs in the government's possession  
11 of the alleged compartment.

12 11. Expert Witnesses. The defendant requests the name, qualifications, and a written  
13 summary of the testimony of any person that the government intends to call as an expert witness during its  
14 case in chief. FED. R. CRIM. P. 16(a)(1)(E). This summary should include a description of the witness'  
15 opinion(s), as well as the bases and the reasons for the opinion(s). See United States v. Duvall, 272 F.3d  
16 825 (7th Cir. 2001) (finding that government's written expert notice did not adequately summarize or  
17 describe police detective's testimony in drug prosecution where notice provided only a list of the general  
18 subject matters to be covered and failed to identify what opinion the expert would offer on those subjects).  
19 This request includes, but is not limited to, disclosure of the qualifications of any government witness who  
20 will testify that she understands and/or speaks Spanish or any other foreign language that may have been  
21 used during the course of an interview with the defendant or any other witness.

22 The defense requests the notice of expert testimony be provided at a minimum of two weeks  
23 prior to trial so that the defense can properly prepare to address and respond to this testimony, including  
24 obtaining its own expert and/or investigating the opinions, credentials of the government's expert and obtain  
25 a hearing in advance of trial to determine the admissibility of qualifications of any expert. See Kumho v.  
26 Carmichael Tire Co., 526 U.S. 137, 119 S. Ct. 1167, 1176 (1999) (trial judge is "gatekeeper" and must  
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determine, reliability and relevancy of expert testimony and such determinations may require “special briefing or other proceedings”)

12. Impeachment evidence. The defendant requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. See FED. R. EVID. 608, 609 and 613. Such evidence is discoverable under Brady v. Maryland, *supra*. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility).

13. Evidence of Criminal Investigation of Any Government Witness. The defense requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

14. Evidence of Bias or Motive to Lie. The defense requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).

15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity. The defendant requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).

16. Witness Addresses. The defense requests the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses). The defendant also requests the name and last known address of every witness to the crime or



1 crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a  
2 government witness. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

3 17. Name of Witnesses Favorable to the Defendant. The defendant requests the name of any  
4 witness who made any arguably favorable statement concerning the defendant or who could not identify his  
5 or who was unsure of his identity, or participation in the crime charged. Jackson v. Wainwright, 390 F.2d  
6 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d  
7 1164, 1168 (6th Cir. 1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086  
8 (1980).

9 18. Statements Relevant to the Defense. The defendant requests disclosure of any statement  
10 that may be "relevant to any possible defense or contention" that she might assert. United States v.  
11 Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This includes Grand Jury transcripts which are relevant to the  
12 defense motion to dismiss the indictment.

13 19. Jencks Act Material. The defendant requests production in advance of the motion  
14 hearing or trial of all material, including dispatch tapes, which the government must produce pursuant to the  
15 Jencks Act, 18 U.S.C. § 3500 and FED. R. CRIM. P. 26.2. A verbal acknowledgment that "rough" notes  
16 constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a  
17 statement under section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963); see also  
18 United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that interview notes constitutes Jencks  
19 material when an agent reviews notes with the subject of the interview); see also United States v. Riley, 189  
20 F.3d 802, 806-08 (9th Cir. 1999). Advance production will avoid the possibility of delay of the motion  
21 hearing or trial to allow the defendant to investigate the Jencks material. Defendant requests pre-trial  
22 disclosure of such statements to avoid unnecessary recesses and delays and to allow defense counsel to  
23 prepare for, and use properly any Jencks statements during cross-examination.

24 20. Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the  
25 defendant requests all statements and/or promises, expressed or implied, made to any government witnesses,  
26 in exchange for their testimony in this case, and all other information which could arguably be used for the  
27 impeachment of any government witnesses.

1           21. Agreements Between the Government and Witnesses. The defendant requests discovery  
2 regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future  
3 compensation, or any other kind of agreement or understanding, including any implicit understanding  
4 relating to criminal or civil income tax, forfeiture or fine liability, between any prospective government  
5 witness and the government (federal, state and/or local). This request also includes any discussion with a  
6 potential witness about or advice concerning any immigration benefits, any contemplated prosecution, or  
7 any possible plea bargain, even if no bargain was made or the advice not followed.

8           22. Informants and Cooperating Witnesses. The defendant requests disclosure of the names  
9 and addresses of all informants or cooperating witnesses used or to be used in this case, and in particular,  
10 disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime  
11 charged against the defendant. The government must disclose the informant's identity and location, as well  
12 as disclose the existence of any other percipient witness unknown or unknowable to the defense. Roviaro  
13 v. United States, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from  
14 informants which exculpates or tends to exculpate the defendant.

15           23. Bias by Informants or Cooperating Witnesses. The defendant requests disclosure of any  
16 information indicating bias on the part of any informant or cooperating witness. Giglio v. United States, 405  
17 U.S. 150 (1972). Such information would include what, if any, inducements, favors, payments or threats  
18 were made to the witness to secure cooperation with the authorities.

19           24. Personnel Records of Government Officers Involved in the Arrest. Defendant requests  
20 all citizen complaints and other related internal affairs documents involving any of the immigration officers  
21 or other law enforcement officers who were involved in the investigation, arrest and interrogation of  
22 Defendant. See Pitchess v. Superior Court, 11 Cal. 3d 531, 539 (1974). Because of the sensitive nature of  
23 these documents, defense counsel will be unable to procure them from any other source.

24           25. Training of Relevant Law Enforcement Officers. Defendant requests copies of all  
25 written, videotaped or otherwise recorded policies or training instructions or manuals issued by all law  
26 enforcement agencies involved in the case (United States Customs Service, Border Patrol, INS, Homeland  
27 Security, etc.) to their employees regarding: (a) the handling of vehicles suspected to be transporting  
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1 contraband across the port of entry; (b) the referral to secondary inspection of persons within those vehicles;  
2 (c) the detention of individuals within those vehicles; (d) the search of those vehicles and the occupants of  
3 those vehicles, including the proper means of obtaining consent to search and what constitutes consent to  
4 search; (e) the informing of suspects of their Constitutional rights; (f) the questioning of suspects and  
5 witnesses. Defendant also requests all written or otherwise attainable information regarding the training of  
6 Customs agents at ports of entry in California to detect or discover narcotics and/or people in vehicles  
7 entering the United States, including any training offered to Border Patrol, INS, or officers of Homeland  
8 Security Department, by the DEA, or other law enforcement agencies or individuals.

9           26. Performance Goals and Policy Awards. Defendant requests disclosure of information  
10 regarding standards used for measuring, compensating or reprimanding the conduct of all law enforcement  
11 officers involved in the case (Customs, Border Patrol, INS, etc.) to the extent such information relates to the  
12 detection of contraband. This request specifically includes information concerning performance goals,  
13 policy awards, and the standards used by Customs for commending, demoting, or promoting agents for their  
14 performance at the port of entry and their success or failure to detect illegal narcotics and/or people in  
15 general.

16           27. TECS Reports. Defendant requests all TECS reports, including reports pertaining to all  
17 vehicle border crossings pertaining to the vehicle used in this case and any vehicles pertaining to Defendant.

18           28. Reports of Scientific Tests or Examinations. Pursuant to FED. R. CRIM. P. 16(a)(1)(D),  
19 the defendant requests the reports of all tests and examinations conducted upon the evidence in this case.  
20 Including, but not limited to, any fingerprint testing done upon any evidence seized in this case, that is within  
21 the possession, custody, or control of the government, the existence of which is known, or by the exercise  
22 of due diligence may become known, to the attorney for the government, and which are material to the  
23 preparation of the defense or are intended for use by the government as evidence in chief at the trial.

24           29. Residual Request. The defense intends by this discovery motion to invoke his rights to  
25 discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution  
26 and laws of the United States. This request specifically includes all subsections of Rule 16. The defendant  
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requests that the government provide him and his attorney with the above requested material sufficiently in advance of trial.

### III.

#### **THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE INSTRUCTIONS PROVIDED TO THE JANUARY 2007 GRAND JURY RUN AFOUL OF BOTH NAVARRO-VARGAS AND WILLIAMS.**

##### **A. Introduction**

The indictment in the instant case was returned by the January 2007 grand jury. That grand jury was instructed by the Honorable Larry A. Burns, United States District Court Judge on January 11, 2007. See Reporter's Partial Transcript of the Proceedings, dated January 11, 2007, a copy of which is attached hereto as Exhibit A. Judge Burns' instructions deviate from the instructions at issue in the major Ninth Circuit cases challenging a form grand jury instruction previously given in this district in several ways.<sup>2</sup>

After repeatedly emphasizing to the grand jurors that probable cause determination was their sole responsibility, see Ex. A at 3, 3-4, 5,<sup>3</sup> Judge Burns instructed the grand jurors that they were forbidden "from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity [as] criminal is not up to you." See id. at 8. The instructions go beyond that, however, and tell the grand jurors that, should "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of even though the evidence may be insufficient.'" See id. at 8-9. Thus, the instruction flatly bars the grand jury from declining to indict because the grand jurors disagree with a proposed prosecution.

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<sup>2</sup>

See, e.g., United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006); United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir.) (en banc), cert. denied, 126 S. Ct. 736 (2005) (Navarro-Vargas II); United States v. Navarro-Vargas, 367 F.3d 896 (9th Cir. 2004) (Navarro-Vargas I); United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002) (per curiam). Mr. Duran-Benitez has already moved to dismiss under these cases, but has acknowledged that the rulings in them did not support his position. Having actually read the 2007 instructions, Mr. Duran-Benitez now believes that those cases do not permit the excesses here.

<sup>3</sup> See also id. at 20 ("You're all about probable cause.").

1 Immediately before limiting the grand jurors' powers in the way just described, Judge Burns  
 2 referred to an instance in the grand juror selection process in which he excused three potential jurors. See  
 3 id. at 8.

4 I've gone over this with a couple of people. You understood from the  
 5 questions and answers that a couple of people were excused, I think three in this case, because they could  
 not adhere to the principle that I'm about to tell you.

6 Id. That "principle" was Judge Burns' discussion of the grand jurors' inability to give effect to their  
 7 disagreement with Congress. See id. at 8-9.<sup>4</sup> Thus, Judge Burns not only instructed the grand jurors on his  
 8 view of their discretion; he enforced that view on pain of being excused from service as a grand juror.

9 In addition to his instructions on the authority to choose not to indict, Judge Burns also  
 10 assured the grand jurors that prosecutors would present to them evidence that tended to undercut probable  
 11 cause. See id. at 20.<sup>5</sup>

12 Now, again, this emphasizes the difference between the function of the grand  
 13 jury and the trial jury. You're all about probable cause. If you think that  
 14 there's evidence out there that might cause you to say "well, I don't think  
 15 probable cause exists," then it's incumbent upon you to hear that evidence as  
 well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to*  
*present evidence that cuts against what they may be asking you to do if*  
*they're aware of that evidence.*

16 Id. (emphasis added).<sup>6</sup> The district court later returned to the notion of the prosecutors and their duties,  
 17 advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will  
 18 be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." See id. at 27.

19 This motion follows.  
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<sup>4</sup>

22 Counsel has ordered the grand jury selection transcript. Counsel understands that the court reporter  
 23 has refused the prepare the transcript. This Court should order that the transcript be prepared. Because  
 24 Fed.R.Crim.P. 6 permits challenges to grand jurors by the parties, the selection process cannot be secret.  
 At any rate, this Court should also order disclosure under rule 6(e).

25 <sup>5</sup> These instructions were provided in the midst of several comments that praised the United States  
 attorney's office and prosecutors in general.

26 <sup>6</sup>

27 The "in most instances" language suggests that there may be some limit on this principle. Again,  
 28 counsel has ordered the full transcript, and it will likely resolve the question posed in the instant footnote.

**B. Navarro-Vargas Establishes Limits on the Ability of Judges to Constrain the Powers of the Grand Jury.**

The Ninth Circuit has, over vigorous dissents, rejected challenges to various instructions given to grand jurors in the Southern District of California. See Navarro-Vargas II, 408 F.3d 1184. While the Ninth Circuit has thus far (narrowly) rejected such challenges, it has, in the course of adopting a highly formalistic approach<sup>7</sup> to the problems posed by the instructions, endorsed many of the substantive arguments raised by the defendants in those cases. The district court's instructions cannot be reconciled with the role of the grand jury as set forth in Navarro-Vargas II.

For instance, with respect to the grand jury's relationship with the prosecution, the Navarro-Vargas II majority acknowledges that the two institutions perform similar functions: "the public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury." Navarro-Vargas II, 408 F.3d at 1200 (quoting Butz v. Economou, 438 U.S. 478, 510 (1978)). Accord Navarro-Vargas I, 367 F.3d at 900 (Kozinski, J., dissenting) (The grand jury's discretion in this regard "is most accurately described as prosecutorial." ). See also Navarro-Vargas II, 408 F.3d at 1213 (Hawkins, J., dissenting). It recognizes that the prosecutor is not obligated to proceed on any indictment or presentment returned by a grand jury, id., but also that "the grand jury has no obligation to prepare a presentment or to return an indictment drafted by the prosecutor." Id. See Niki Kuckes, The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights") (quoting Wayne LaFave et al., Criminal Procedure § 15.2(g) (2d ed. 1999)).

Indeed, the Navarro-Vargas II majority agrees that the grand jury possesses all the attributes set forth in Vasquez v. Hillery, 474 U.S. 254 (1986). See id.

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<sup>7</sup> See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (criticizing the majority because "[t]he instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence." ).

The grand jury thus determines not only whether probable cause exists, but also whether to "charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense -- all on the basis of the same facts. And, significantly, the grand jury may refuse to return an indictment even "where a conviction can be obtained."

Id. (quoting Vasquez, 474 U.S. at 263). The Supreme Court has itself reaffirmed Vasquez's description of the grand jury's attributes in Campbell v. Louisiana, 523 U.S. 392 (1998), noting that the grand jury "controls not only the initial decision to indict, but also significant questions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime." Id. at 399 (citing Vasquez, 474 U.S. at 263). Judge Hawkins notes that the Navarro-Vargas II majority accepts the major premise of Vasquez: "the majority agrees that a grand jury has the power to refuse to indict someone even when the prosecutor has established probable cause that this individual has committed a crime." See id. at 1214 (Hawkins, J. dissenting). Accord Navarro-Vargas I, 367 F.3d at 899 (Kozinski, J., dissenting); Marcucci, 299 F.3d at 1166-73 (Hawkins, J., dissenting). In short, the grand jurors' prerogative not to indict enjoys strong support in the Ninth Circuit. But not in Judge Burns' instructions.

**C. The Instructions Forbid the Exercise of Grand Jury Discretion Established in Both Vasquez and Navarro-Vargas II.**

The Navarro-Vargas II majority found that the instruction in that case "leave[s] room for the grand jury to dismiss even if it finds probable cause," 408 F.3d at 1205, adopting the analysis in its previous decision in Marcucci. Marcucci reasoned that the instructions do not mandate that grand jurors indict upon every finding of probable cause because the term "should" may mean "what is probable or expected." 299 F.3d at 1164 (citation omitted). That reading of the term "should" makes no sense in context, as Judge Hawkins ably pointed out. See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) ("The instruction's use of the word 'should' is most likely to be understood as imposing an inflexible 'duty or obligation' on grand jurors, and thus to circumscribe the grand jury's constitutional independence."). See also id. ("The 'word' should is used to express a duty [or] obligation.") (quoting *The Oxford American Diction and Language Guide* 1579 (1999) (brackets in original)).



1 The debate about what the word "should" means is irrelevant here; the instructions here make  
2 no such fine distinction. The grand jury instructions make it painfully clear that grand jurors simply may  
3 not choose not to indict in the event of what appears to them to be an unfair application of the law: should  
4 "you disagree with that judgment made by Congress, then your option is not to say 'well, I'm going to vote  
5 against indicting even though I think that the evidence is sufficient'...." See Ex. A at 8-9. Thus, the  
6 instruction flatly bars the grand jury from declining to indict because they disagree with a proposed  
7 prosecution. No grand juror would read this language as instructing, or even allowing, him or her to assess  
8 "the need to indict." Vasquez, 474 U.S. at 264.

9 Nor does the Navarro-Vargas II majority's faith in the structure of the grand jury a cure for  
10 the instructions excesses. The Navarro-Vargas II majority attributes "[t]he grand jury's discretion -- its  
11 independence -- [to] the absolute secrecy of its deliberations and vote and the unreviewability of its  
12 decisions." 408 F.3d at 1200. As a result, the majority discounts the effect that a judge's instructions may  
13 have on a grand jury because "it is the *structure* of the grand jury process and its *function* that make it  
14 independent." Id. at 1202 (emphases in the original).

15 Judge Hawkins sharply criticized this approach. The majority, he explains, "believes that the  
16 'structure' and 'function' of the grand jury -- particularly the secrecy of the proceedings and unreviewability  
17 of many of its decisions -- sufficiently protects that power." See id. at 1214 (Hawkins, J., dissenting). The  
18 flaw in the majority's analysis is that "[i]nstructing a grand jury that it lacks power to do anything beyond  
19 making a probable cause determination ... unconstitutionally undermines the very structural protections that  
20 the majority believes save[] the instruction." Id. After all, it is an "almost invariable assumption of the law  
21 that jurors follow their instructions." Id. (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)). If that  
22 "invariable assumption" were to hold true, then the grand jurors could not possibly fulfill the role described  
23 in Vasquez. Indeed, "there is something supremely cynical about saying that it is fine to give jurors  
24 erroneous instructions because nothing will happen if they disobey them." Id.

25 In setting forth Judge Hawkins' views, Mr. Duran-Benitez understands that this Court may  
26 not adopt them solely because the reasoning that supports them is so much more persuasive than the  
27  
28



majority's sophistry. Rather, he sets them forth to urge the Court *not to extend* what is already untenable reasoning.

Here, again, the question is not an obscure interpretation of the word "should", but an absolute ban on the right to refuse to indict that directly conflicts with the recognition of that right in Vasquez, Campbell, and both Navarro-Vargas II opinions. Navarro-Vargas II is distinguishable on that basis, but not only that.

Judge Burns did not limit himself to denying the grand jurors the power that Vasquez plainly states they enjoy. He also apparently excused prospective grand jurors who might have exercised that Fifth Amendment prerogative, excusing "three [jurors] in this case, because they could not adhere to [that] principle...." See Ex. A at 8. The structure of the grand jury and the secrecy of its deliberations cannot embolden grand jurors who are no longer there, likely because they expressed their willingness to act as the conscience of the community. See Navarro-Vargas II, 408 F.3d at 1210-11 (Hawkins, J., dissenting) (a grand jury exercising its powers under Vasquez "serves ... to protect the accused from the other branches of government by acting as the 'conscience of the community.'") (quoting Gaither v. United States, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969)). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure," United States v. Williams, 504 U.S. 36, 50 (1992), and, here, Judge Burns has both fashioned his own rules and enforced them. The instructions here are therefore structural error. See Navarro-Vargas II, 408 at 1216-17 (Hawkins, J., dissenting). The indictment must be dismissed.

**D. The Instructions Conflict With Williams' Holding that there Is No Duty to Present Exculpatory Evidence to the Grand Jury.**

In Williams, the defendant, although conceding that it was not required by the Fifth Amendment, argued that the federal courts should exercise their supervisory power to order prosecutors to disclose exculpatory evidence to grand jurors, or, perhaps, to find such disclosure required by Fifth Amendment common law. See 504 U.S. at 45, 51. Williams held that "as a general matter at least, no such 'supervisory' judicial authority exists." See id. at 47. Indeed, although the supervisory power may provide the authority "to dismiss an indictment because of misconduct before the grand jury, at least where that

misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions,'" id. at 46 (citation omitted), it does not serve as "a means of *prescribing* such standards of prosecutorial conduct in the first instance." Id. at 47 (emphasis added). The federal courts possess only "very limited" power "to fashion, on their own initiative, rules of grand jury procedure." Id. at 50. As a consequence, Williams rejected the defendant's claim, both as an exercise of supervisory power and as Fifth Amendment common law. See id. at 51-55.

Despite the holding in Williams, the instructions here assure the grand jurors that prosecutors would present to them evidence that tended to undercut probable cause. See Ex. A at 20.

Now, again, this emphasizes the difference between the function of the grand jury and the trial jury. You're all about probable cause. If you think that there's evidence out there that might cause you say "well, I don't think probable cause exists," then it's incumbent upon you to hear that evidence as well. As I told you, in most instances, *the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence.*

Id. (emphasis added). Moreover, the district court later returned to the notion of the prosecutors and their duties, advising the grand jurors that they "can expect that the U.S. Attorneys that will appear in from of [them] will be candid, they'll be honest, and ... they'll act in good faith in all matters presented to you." See id. at 27.

This particular instruction has a devastating effect on the grand jury's protective powers, particularly if it is not true. It begins by emphasizing the message that Navarro-Vargas II somehow concluded was not conveyed by the previous instruction: "You're all about probable cause." See Ex. A at 20. Thus, once again, the grand jury is reminded that they are limited to probable cause determinations (a reminder that was probably unnecessary in light of the fact that Judge Burns had already told the grand jurors that they likely would be excused if they rejected this limitation). The instruction goes on to tell the grand jurors that they should consider evidence that undercuts probable cause, but also advises the grand jurors



1 of this Court, the defense will file further motions. Therefore, defense counsel requests the opportunity to  
2 file further motions.

3 **V.**

4 **CONCLUSION**

5 For the foregoing reasons, Mr. Brown respectfully requests that the Court grant the above  
6 motions.

7 Respectfully submitted,

8  
9 Dated: January 22, 2008

10 **MICHELLE BETANCOURT**  
Federal Defenders of San Diego, Inc.  
Attorneys for Mr. Brown  
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